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No. 112

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1927.

AETNA INSURANCE COMPANY, et al.,
Petitioners,

vs.

EN C. HYDE, Superintendent of the Insurance Department of the State of Missouri,
Respondent.

Writ of Certiorari to the Supreme Court of the State of Missouri.

PETITION FOR REHEARING.

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SUPREME COURT OF THE UNITED STATES.

No. 112.—October Term, 1927.

Aetna Insurance Company, et al. Petitioners, *vs.* Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri.	On Writ of Certiorari to the Supreme Court of the State of Missouri.

[January 3, 1928.]

Mr. Justice Butler delivered the opinion of the Court.

October 9, 1922, respondent, acting under § 6283, Revised Statutes of Missouri, 1919, made findings of fact and an order directing a reduction of ten per cent. in the rates charged by stock companies for fire, lightning, hail and windstorm insurance. The petitioners, 156 companies, were all the stock fire insurance companies engaged in that business in Missouri. November 10, 1922, they brought this suit under § 6284 praying that the order be reviewed and set aside. The complaint challenges the methods employed by respondent to make the calculations provided for and alleges that the findings and order are unreasonable, confiscatory and in contravention of the due process clause of the Fourteenth Amendment. Issue was joined and a trial was had. The circuit court, confirming the report of a referee appointed to hear the evidence and report his findings of fact and conclusions of law, found the order unreasonable and confiscatory and entered a decree setting it aside. The Supreme Court reversed and dismissed the case. — Mo. —. This court granted a writ of certiorari. 273 U. S. 681.

Respondent insists that the case presents no federal question. In order to determine whether that contention has merit, it is necessary to examine the statutory provisions under which the respondent made the findings and order complained of, the grounds on

which petitioners seek to have them set aside, and the decision of the Supreme Court.

Section 6283, as it was at the time the order was made,[1] provided that the superintendent of insurance "is hereby empowered to investigate the necessity for a reduction of rates, and if, upon such investigation, it appears that the result of the earnings in this state of the stock fire insurance companies for five years next preceding such investigation shows there has been an aggregate profit therein in excess of what is reasonable, he shall order such reduction of rates as shall be necessary to limit the aggregate collections by insurance companies in this state to not more than a reasonable profit. . . ."

Section 6284, as it stood when this suit was commenced, provided: "The orders and directions of the superintendent of insurance, together with his findings or determinations of facts upon which such order or determination is founded, shall be reviewable by a proper action in the courts, and upon such review the entire matter shall be treated and determined de novo. . . ." This section was amended before the trial. Laws of 1923, p. 235. The following was added: "The court shall have authority to sustain, set aside or modify the orders and directions under review."

The complaint alleges that the rates were not excessive before the reduction; that each company has local agency plants in Missouri ranging in value from $10,000 in case of small companies having but few agencies to $50,000 for larger companies having many, and that the good will of the agencies of each is of great value; that in Missouri normal expenses of each are from 35 to 45 per cent. of earned premiums and the yearly aggregate of all expenses is approximately 42 per cent. of all earned premiums, but that in the five year period ending with 1921 total expenses amounted to about 44 per cent. of all premiums earned for insurance written in that period; that, in accordance with Missouri law, each company maintains a sum equal to its unearned premiums; that each should also have a surplus over its capital stock of three per cent. of its premiums on fire insurance policies in each year to meet the hazards of conflagration[2] and of ten per cent.

[1] This section has since been amended. Laws 1923, p. 235.

[2] The referee reported that a conflagration is any loss in excess of $1,000,000, and that it is customary to charge that amount of the loss against the State in which it occurs, and prorate the remainder among all the States.

of other premiums against the risk of other catastrophes; and that each company is entitled to earn annually an underwriting profit of at least five per cent. of the earned premiums; that such profit for any period is the amount of premiums earned less losses and expenses incurred; that in the five year period ending with 1921 the combined experience of all companies on all classes of insurance in Missouri was: losses incurred, 64.9 per cent. of earned premiums, expenses incurred, 44.4 per cent., making a total of 109.3 per cent., without any allowance for a fund to meet conflagration and catastrophe hazards or for profits to the companies.

And the complaint shows that prior to the order here in question and on January 5, 1922, the superintendent made an order reducing rates 15 per cent. The companies sued him to enjoin its enforcement. The parties entered into a stipulation reciting that he had revoked the order and agreeing that the case be dismissed. And it was stated therein that the superintendent, not earlier than March 15, 1922, might call a hearing to investigate the necessity for a reduction of rates; that at such hearing the experience of the companies in Missouri for 1921 should be offered in evidence and considered by the superintendent, together with such other evidence as might be offered; that at the conclusion of the hearings the superintendent would make certain findings of fact and announce his determination. And the stipulation contained the following: "That if . . an order reducing the rates . . be made . . the said insurance companies, if dissatisfied . . will proceed to secure a review thereof by the trial de novo in the Circuit court of Cole County, Missouri. . . . That in such matter the question of the constitutionality of §§ 6283 and 6284 . . . shall not be raised, nor shall the legality of the hearing above provided for be questioned."

And the complaint alleges that there was a hearing at which the companies performed their part of the agreement, but that the superintendent failed to make the findings specified in the stipulation. The order (set forth in the bill) stated that the companies refused to supply necessary data to enable the superintendent to make such findings, and that his investigation was based on sworn reports filed by the companies during the five-year period. The findings contained in the order are that, in respect of the business in Missouri, the companies in that period collected net premiums

The complaint was framed to secure judicial review (§ 6284) of the determination of the respondent. The ground of attack was that the aggregate profits were not excessive and that the aggregate collections permitted under the reduced rates were too low. Allegations asserting in general language that the findings, order and reduced rates are confiscatory and repugnant to the Fourteenth Amendment are not sufficient. In order to invoke the constitutional protection, the facts relied on to restrain the enforcement of rates prescribed under the sanction of state law must be specifically set forth, and from them it must clearly appear that the rates would necessarily deny to the plaintiff just compensation and deprive it of its property without due process of law. *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298, 314; *Atlantic Coast Line* v. *Florida*, 203 U. S. 256. Jurisdiction of this Court to set aside state-made rates as confiscatory will be exercised only in clear cases. And the burden is on one seeking that relief to bring forward and satisfactorily prove the invalidating facts. *Chicago, &c. Ry. Co.* v. *Wellman*, 143 U. S. 339, 344-345; *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 441, 446; *Knoxville* v. *Water Co.*, 212 U. S. 1, 8, 16; *The Minnesota Rate Cases*, 230 U. S. 352, 433, 452; *Brush Elec. Co.* v. *Galveston*, 262 U. S. 443, 446. Neither of the sections authorized a determination of the reasonableness of rates when applied to the business of any company. The complaint did not allege any facts to show that the reduced rates were confiscatory as to any company. The court was not called upon to determine whether the order would operate to deprive any company of its property without due process of law. It treated the suit as one to obtain the review provided for by § 6284.

The petitioners are competitors and each carries on business for itself. While they may by joint action pursue the remedy given by § 6284, it does not follow that the Constitution safeguards aggregate profits sufficient to constitute just compensation for all the companies. The complaint fails to show any joint interest or right in or to the business covered by the rates or the protection sought to be invoked. And it fails to show that the business in Missouri of each is so well and economically organized and carried on that petitioners are entitled, as of right protected by the Constitution, to have premiums amounting in the aggregate enough to yield

a reasonable return or profit to all the companies. Assuming that, upon any state of facts, the petitioners would be entitled jointly to have such protection, and as to that no opinion is expressed, it is enough to say that the facts brought forward in this case are not sufficient to raise the question whether the state law or the superintendent's finding of facts or his order is repugnant to the due process clause of the Fourteenth Amendment. No federal question is presented.

Writ dismissed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1927.

AETNA INSURANCE COMPANY, et al., *Petitioners,* vs. BEN C. HYDE, Superintendent of the Insurance Department of the State of Missouri, *Respondent.*	Writ of Certiorari to the Supreme Court of the State of Missouri.

PETITION FOR REHEARING.

I.

(A) In this case the Court, after submission of briefs on the subject of jurisdiction granted a petition for certiorari to the Supreme Court of Missouri.

(B) Briefs were filed to the merits of the issue that the constitutional rights of petitioners had been invaded. The jurisdiction of this Court attached by the determination of this Court. The respondent in his brief asserted only one ground for rejection of jurisdiction by this Court and that was in the main that:

> "No confiscation is involved because they have no property in Missouri and made an enormous return." (Brief for respondent, p. 77.)

(C) This Court has ordered dismissal of the writ, upon a ground not asserted by any party to the record and not briefed; namely, that:

> "It is not claimed by or on behalf of *any* company that, when applied to *its* business, the reduced rates are

or would be too low to permit *the* company to make a reasonable profit or have just compensation for *its* contracts of insurance."

(D) The point so made by the Court not having been raised by any of the parties to the record and not having been the subject of consideration or discussion, and being too complex in its nature to permit of adequate presentation herein, because of the governing rules of this Court upon rehearing, this Court should have the benefit of a reargument directed to this new question.

(E) A suit similar to the present action will be presented to this Court upon certiorari within the next thirty days. (Such action arises in Kansas under the statutes of that state, which have already had the consideration of this Court in *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389.) In the Kansas case, soon to be presented here, there was elaborate evidence of economists and others skilled in the subjects of insurance rates and averages to the effect that rates for the future of any one insurance company cannot possibly be made upon any basis except upon the consideration of the experience of a large number of companies over a considerable period of time in a territory not smaller than a state. A reargument of this case may reasonably be ordered in connection with the Kansas case, as this Court will have the present questions for reconsideration in that case.

II.

This Court has in its opinion stated that:

"(A) Section 6283 requires consideration *en masse* of the 'result of the earnings' of all the companies, and, upon finding an excessive 'aggregate profit,' it becomes the duty of the superintendent to limit the 'aggregate collections' to not more than a reasonable profit. The reduced rates are applicable to the business of all companies alike and without regard to the amount of the past

or prospective profits or losses of any of them. And the attack is by joint action of all the companies. It is not claimed by or on behalf of any company that, when applied to its business, the reduced rates or or would be too low to permit the company to make a reasonable profit or to have just compensation for its contracts of insurance." (p. 5.)

This Court has also said in the opinion:

"(B) The Fourteenth Amendment does not protect against competition. Moreover, 'aggregate collections' sufficient to yield a reasonable profit for all do not necessarily give to each just compensation for the contracts of insurance written by it. It has never been and cannot reasonably be held that state-made rates violate the Fourteenth Amendment merely because the aggregate collections are not sufficient to yield a reasonable profit or just compensation to all companies that happen to be engaged in the affected business."

This Court in its opinion also said:

"(C) Neither of the sections authorized a determination of the reasonableness of rates when applied to the business of any company. The complaint did not allege any facts to show that the reduced rates were confiscatory as to any company. The court was not called upon to determine whether the order would operate to deprive any company of its property without due process of law. It treated the suit as one to obtain the review provided for by Section 6284." (p. 6.)

The opinion further says:

"(D) The petitioners are competitors and each carries on business for itself. While they may by joint action pursue the remedy given by section 6284, it does not follow that the Constitution safeguards aggregate profits sufficient to constitute just compensation for all the companies. The complaint fails to show any joint interest or right in or to the business covered by the rates or the protection sought to be invoked." (p. 6.)

We respectfully submit that the Court has fallen into error in each of the particulars above mentioned, and has done so

in assuming that the principles which apply in the cases of railroads and public utilities can have application to the business of insurance.

Our position as to each of these statements of the Court (A, B, C, D), baldly stated hereunder (and argued under the next succeeding Point III), is as follows:

(A) The statute of Missouri, as written, and the practice and philosophy of the business of insurance are in accord. The reduced rate order of the superintendent attacked in this case, requires *each company* in the state to do business in the future at a loss, permits no profit to *any* one of them, and has in contemplation past average profits of a group of companies as a measure of prospective profits of *each* of the petitioners. It is claimed on behalf of *each* and *every* company which is a petitioner in the case that, when applied to its business, the reduced rates are, and will be, too low to permit it to make a reasonable profit, or any profit whatever, and deprives the petitioners, and *each and every* of them, of any compensation upon its respective contracts of insurance.

(B) Neither the statute nor the method followed out in the review petition filed in the trial court contemplates a yield of a "reasonable profit for all." It is neither in contemplation of the statute, nor the purpose of the suit, nor the claim of the petitioners that *all* of the petitioners are entitled to make a profit, or that just compensation requires that they *all* and each make something because they happen to be engaged in the business. There is no competition between the petitioners, in the true sense of the term, and the statute declares and recognizes an absence of competition, in which position the petitioners concur and we claim that a lack of competition in rates will necessarily exist with or without existence of statute.

(C) The sections of the statute under consideration authorize a determination of reasonableness of rates applied to the business of particular or *several* companies, and all the decisions in Missouri of the Referee, the trial Court and the Supreme Court were upon this assumption. The complaint does allege that the rates in question will operate to confiscate the property of the *respective* complainants. The superintendent by his order and the Supreme Court of Missouri by its decision directed a *confiscation and a deprivation of property of each of the petitioners*, and could not come to the conclusions they did without necessarily deciding in favor of confiscation.

(D) Petitioners are not competitors in a proper sense of the word as applied to their charge of premiums upon their policies. They do not contend for "compensation for *all* the companies," but contend that an order which has the necessary effect of depriving *each* of the petitioners of *any* compensation whatever, and which proceeds upon an unsound basis of computation, invades the constitutional rights of each of petitioners.

Necessarily, the statements we make herein are bald and do not define themselves. An understanding of our position in these respects requires an elaboration, which we set forth in the next division of this petition. We call to the Court's attention, however, that the subject is so comprehensive that it cannot possibly be done justice in this petition, and we ask the Court to grant a reargument so we may place the matter fully before the Court.

III.

There was a time when rates for fire insurance were arbitrarily made by the will of those conducting the business of insurance. That situation has long since disappeared. Local tariffs and basis rates for fixing fire insurance rates are now

Such a measure is, in its nature, impossible of application to the business of fire insurance. This Court has recognized that fire insurance is in a class peculiar to itself, and we will call attention to this Court's discussion of such matters at a later point in the brief.

To state the matter as briefly as possible, insurance of the character conducted by these petitioners rests upon averages. It cannot rest upon individual or isolated parts of it, but requires a survey of it all, to come to any conclusion of value. A long period of time and a large number of risks, and therefore a large territory, are necessary to reach averages of any value whatever. To take the experience of *one* company upon *one* parcel of property for 200 years would not be of the slightest value whatever, because one parcel cannot be productive of averages. To take the insurance experience upon every parcel of property in the United States over one second of time is equally valueless, because in that case there is an inadequate period of time from which to draw any conclusions. To take the experience of any one of the 157 companies doing business in Missouri over any conceivable period of time is completely useless. Upon the average, each of these companies will, in the five-year test period, have one-one hundred fiftieth of the risks in its experience which are embraced within the experience of all the companies doing business in the state during that period. For one company, therefore, to have the same aggregate experience upon which to predicate averages as do 150 companies, the experience which the 150 companies have in five years of time, (which is the standard of this statute), would not be reached by one company short of 150 times that period of time, which would be 750 years. The largest company doing business in Missouri will not do more than one-fifteenth of the whole business in the state, and that company could not therefore acquire the same experience upon its business which all the companies had in five years, except by the elaps-

ing of at least seventy-five years time. To state the matter still otherwise, the experience of one company during five years of time would be approximately the equivalent of the experience of all of the companies in the state for ten days of time. The Court can readily see that the experience of any one company presents nothing upon which to ground any prognostication for the future.

This Court has assumed that if a certain company—say Company A—*has made* a profit in Missouri during the five-year elapsed period, that some kind of presumption may be indulged that it *will make* money in the future and therefore it cannot say that it has suffered confiscation if its rates are reduced; whereas another company which has lost money during the five-year period is in position to complain because it will presumably lose money in the future. To draw such presumptions is to entirely misunderstand the business of insurance. No presumption is or can properly be drawn that because any one company made money in any past period of time that it will do so in the future, or because any given company has suffered loss on its business in the past that it will suffer loss on its business in the future; even if we assume that general conditions remain identical in all respects.

The Court has acted upon the assumption that these companies are competitors, independently engaged in competition with each other in business, and that they each have their own line of customers on whom they rely for their business, and that their customers will, in general, be those they had in the past.

In the case of a railroad company, which draws upon a specified territory for its business, naturally the business of shippers on its line of railroad will go, to a greater or less extent, to that railroad. It is not practical or possible for a shipper in Washington, District of Columbia, to ship his